Supreme Court, U.S.
FILED
FEB 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-826

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JEROME F. GOLDBERG AND ROBERT MCTIGUE,
Appellants,

v.

ROGER D. SWEET, DIRECTOR OF THE
ILLINOIS DEPARTMENT OF REVENUE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Illinois

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

WALTER A. SMITH, JR.*
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including)
professional corporations)
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6448

JOHN G. JACOBS
JONAH J. ORLOFSKY
PLOTKIN & JACOBS, LTD.
116 South Michigan Avenue
Suite 1300
Chicago, Illinois 60603
(312) 372-0001

Counsel for Appellants

Of Counsel:

WILLIAM G. CLARK, JR.
WILLIAM G. CLARK, JR.
& ASSOCIATES, LTD.
29 South LaSalle Street
Chicago, Illinois 60603
(312) 263-0830

* Counsel of Record

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In our Jurisdictional Statement we showed (at 25-28) that the constitutional question presented by this case has broad significance for interstate telecommunications and state tax practices. We also showed (at 11-24) that the lower court's resolution of the question contravened the Commerce Clause and departed from controlling precedents of this Court. Significantly, appellees have not moved to dismiss the appeal, implicitly conceding that a substantial federal question is presented. Indeed, even in their Motion to Affirm appellees do not dispute the broad significance of the question. Instead, appellees' Motion to Affirm is based solely on the contention that the lower court correctly applied this Court's precedents in upholding a tax that even the lower court called "constitutionally suspect." App. 11a.

1. Virtually every argument presented in appellees' motion is premised on a single erroneous proposition—that Illinois has chosen to tax only activity occurring wholly within Illinois. Thus, appellees contend that the sole "taxable event" under the Act is "the origination or receipt in Illinois of a telephone call—singularly local events." Motion to Affirm at 5. Appellees made this same fallacious argument to the trial court and to the Illinois Supreme Court and it was rejected by both those courts for the same reason—it is flatly contrary to the plain language of the Act and to the intent of the legislature in adopting the Act.

Section 4 of the Act lays a five percent tax on the "gross charge" for "interstate telecommunications" originated or received in Illinois; Section 2(a) in turn defines this "gross charge" as the amount paid for the act or privilege of originating or receiving telecommunications in this State *and for all services and equipment provided in connection therewith* * * *" (emphasis supplied). Given this statutory language, there is simply no question—as the Illinois Supreme Court's construction of the Act conclusively established—that the legislature intended that the tax apply "to *the entirety* of each and every interstate communication," not simply to the origination or receipt of those communications. App. 10a (emphasis supplied). There is also no question that by taxing the *entirety* of the interstate communications, Illinois has taxed commerce occurring outside its borders.[1]

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[1] Appellees imply that if the telephone company assessing the retail charge had chosen to "divide" its charges between those attributable to Illinois and those attributable to other States, then the Act would have taxed only the portion attributable to Illinois. Motion to Affirm at 6. But that is not what the Act says. As the Illinois Supreme Court definitively determined, through Section 2(a) Illinois specifically intended to levy its tax on the "gross charge" for the *entire* call, including out-of-state services. Moreover, the fact that a private retailer may elect to charge a customer for both in-state and out-of-state services obviously does not relieve the States of their *constitutional* obligation to tax only in-state services.

2. Having erroneously assumed that the Act taxes only in-state activity, appellees misconstrue the precedents from this Court that apply to the tax and render it unconstitutional. Thus, appellees acknowledge (Motion to Affirm at 4, 8) that *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) is controlling and requires that the Illinois tax be: (1) fairly apportioned; (2) nondiscriminatory; and (3) measured according to services rendered in-state. But appellees' erroneous assumption that no out-of-state activity is being taxed causes them to misapply all three of this Court's requirements.

a. With regard to the apportionment requirement, appellees ignore the Illinois Supreme Court's determination that the tax is completely "unapportioned". App. 11a. Instead, appellees cite *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) for the proposition that "[f]air apportionment can include 100% apportionment in the taxing State." Motion to Affirm at 8. But *Commonwealth Edison* is totally inapposite and was not an "apportionment" case at all. There Montana laid a severance tax on 100 percent of the value of coal mined completely in that State. This Court held that inasmuch as "[t]he entire value" of the coal "originate[d] in the State," it was proper that the State tax that entire value. 453 U.S. at 624-625. Here, of course, part of the value of the interstate communications is necessarily produced outside Illinois;[2] nevertheless, Illinois continues to tax 100 percent of the value of those communications. Such a tax cannot be squared with *Complete Auto* or *Commonwealth Edison*.[3]

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[2] Appellees in fact concede that "a percentage of the charges * * * are related to out-of-state activity * * *." Motion to Affirm at 10.

[3] Ironically, in the single instance where appellees purport to analyze the tax pursuant to the construction of the Act placed on it by the Illinois Supreme Court (Motion to Affirm at 16-17), they nonetheless revert to an analysis of the Act as a tax on the "sale" of interstate calls in Illinois—the very approach precluded by the lower court's construction of the State statute. Again, appellees have

b. Appellees likewise misapply the two important components of this Court's nondiscrimination requirement: (a) that a tax not effectively assess a higher charge for State services on interstate commerce than it does on intrastate commerce; and (b) that a tax not subject interstate commerce to multiple taxation. Regarding the first component, appellees say that "[t]he Act is not discriminatory because it imposes the same rate of tax on intrastate and interstate calls * * *." Motion to Affirm at 14. As this Court recently held, however, even though a tax may not be "facially discriminatory," it violates the Commerce Clause if "[i]n practical effect" it imposes a higher cost on interstate commerce than intrastate commerce for comparable State services. *American Trucking Associations, Inc. v. Scheiner*, 107 S. Ct. 2829, 2839, 2841 (1987). Although the Illinois Act subjects both interstate and intrastate calls to a five percent tax, our Jurisdictional Statement (at 21-22) demonstrated that the discriminatory *effect* of the Act is to cause interstate calls to be burdened at a substantially higher level than intrastate calls for the same amount of services provided by the State.

The tax also discriminates against the interstate communications by subjecting them to the risk of multiple taxation for the same services—a risk not borne by Illinois intrastate communications. *See* Jurisdictional Statement at 11-20. But once again taking the erroneous view that Illinois is not taxing out-of-state activities at all, appellees assert that "[t]he Act does not impose a multiple burden because the Illinois activity which is taxed is

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erroneously supposed that it is local "sales" that are being taxed, rather than the entire value of interstate communications. Moreover, the case relied on by appellees—*Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978)—simply upheld an in-state sales formula as a reasonable method for determining what part of a company's interstate business was allocable to that State. Here, on the other hand, Illinois has adopted no formula at all; instead, it has chosen to tax 100 percent of certain interstate communications (*i.e.*, all those charged to an Illinois address).

separate from the activity which other States might try to reach." Motion to Affirm at 13. This is plainly incorrect. In laying a five percent surcharge on the entire retail price of interstate communications—which originate or are received in *other* States—Illinois is clearly taxing activity which is otuside its borders and which is subject to tax by the other States involved. Such a tax subjects interstate commerce to multiple taxation and is prohibited by this Court's decisions.[4]

c. Finally, with regard to this Court's requirement that Illinois' tax be fairly related to services provided by Illinois, appellees one last time contend that the Act is limited to "the taxpayer's activity in Illinois." Motion to Affirm at 15. They furthermore contend that the tax "is based on the value the person in Illinois places upon this activity measured by the amount he is willing to pay for a telephone call. It is, therefore, fairly related to activity in Illinois." *Id.* at 16. This completely misconstrues the fair-relation requirement of *Complete Auto.* The fact that an Illinois taxpayer is willing to pay $5.00 for an interstate call from Chicago to Los Angeles certainly does not establish that the entire $5.00 charge is fairly related to services provided by Illinois. Indeed, as

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[4] While appellees are forced to concede (Motion To Affirm at 13 n.5) that "the record discloses municipal ordinances and state statutes from states other than Illinois [that impose taxes on these same telecommunications]," they are reduced to arguing that those other taxes should be ignored because "the actual application of those foreign ordinances and the credit provision [of the Illinois Act] to a particular taxpayer in Illinois and the resulting impermissible multiple burden is not shown in this record." Hence, appellees suggest, "[t]his case does not present an appropriate vehicle for challenging the effectiveness of the credit provision of the Act [which credit provision ultimately formed the basis of the lower court's finding of constitutionality] because the existence of *actual multiple burdens* is not demonstrated in the record" (emphasis supplied). *Id.* This argument cannot be reconciled with this Court's decision in *Armco Inc. v. Hardesty*, 467 U.S. 638 (1984), holding that actual multiple taxation need not be shown, but only the *possibility* of such multiple taxation.

we showed in our Jurisdictional Statement (at 23-25), Illinois' tax is in fact *inversely* proportional to the amount of in-state activities since the five percent tax produces *ever-increasing* revenues for longer, more expensive interstate calls, just when Illinois contributes an ever-decreasing amount of proportionate services to those calls. This is directly contrary to this Court's requirement that the measure of the tax be reasonably related to the activity in, and value obtained from, the State. *Scheiner*, 107 S. Ct. at 2844; *Commonwealth Edison*, 453 U.S. at 626. Illinois' tax therefore violates all three of the key requirements of *Complete Auto*. Accordingly, the judgment upholding the constitutionality of the tax should not be affirmed by this Court.

CONCLUSION

For the foregoing reasons, and those presented in the Jurisdictional Statement, probable jurisdiction should be noted, and the decision below should be reversed.

Respectfully submitted,

WALTER A. SMITH, JR.*
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including)
professional corporations)
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6448

JOHN G. JACOBS
JONAH J. ORLOFSKY
PLOTKIN & JACOBS, LTD.
116 South Michigan Avenue
Suite 1300
Chicago, Illinois 60603
(312) 372-0001

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WILLIAM G. CLARK, JR.
WILLIAM G. CLARK, JR.
& ASSOCIATES, LTD.
29 South LaSalle Street
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